89-573

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

BOB HERBERT & ASSOCIATES, INC.,
Petitioner

v.

KING MANUFACTURING & SALES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September 1989

Alpha Law Brief Co., Inc. — 8748 Westpark — Houston, Texas 77063 — 789-2000

QUESTIONS PRESENTED

1. IS A SETTLEMENT JUDGMENT RENDERED BY A FEDERAL DISTRICT COURT SUBJECT TO BANKRUPTCY RULE 9019 APPROVAL WHERE THE DEBTOR IN POSSESSION SUES UNDER BANKRUPTCY RULE 6009?

2. IN SUCH A SUIT, MAY THE DEFENDANT ASSERT A COUNTERCLAIM WITHOUT FIRST OBTAINING AN ORDER LIFTING THE 11 U.S.C. SECTION 362 AUTOMATIC STAY?

3. IS *BOSTICK* DISTINGUISHABLE ON THE FACTS?

4. CAN A CREDITOR HOLDING A SECURED CLAIM, NOT A PARTY TO THE SETTLEMENT JUDGMENT, BUT WITH A CONSTRUCTIVE KNOWLEDGE OF IT AND IN PRIVITY WITH THE DEBTOR, INTERVENE IN THE DISTRICT COURT FOURTEEN MONTHS AFTER JUDGMENT, AND AFTER THE CLAIM HAS BEEN ABANDONED TO THE CREDITOR BY THE TRUSTEE AND IS NO LONGER PROPERTY OF THE ESTATE, TO SET ASIDE THE JUDGMENT ON THE GROUND IT LACKED RULE 9019 APPROVAL?

5. IN THIS SITUATION, DOES THE BANKRUPTCY COURT HAVE JURISDICTION ON REMAND?

LIST OF INTERESTED PARTIES

1. BOB HERBERT & ASSOCIATES, INC., Houston, Texas, Petitioner.

2. GERALD E. HOPKINS, 4920 Center, Houston, Texas, Attorney for Petitioner.

3. TERRY T. WIENS, 3015 N.W. 59th Street, Oklahoma City, Oklahoma, Attorney for Petitioner.

4. KING MANUFACTURING & SALES, INC., Oklahoma City, Oklahoma, Respondent.

5. GEARY L. WALKE, 3904 East Reno, Oklahoma City, Oklahoma, Attorney for Respondent in the U.S. District Court, Western District of Oklahoma.

6. GRANT SQUARE BANK & TRUST COMPANY, Oklahoma City, Oklahoma, Intervenor.

7. THOMAS S. BALA, 501 N.W. Expressway, Suite 230, Oklahoma City, Oklahoma, Attorney for Intervenor.

The caption does not reveal the name of the Intervenor.

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NO. _____

IN THE

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OCTOBER TERM, 1989

BOB HERBERT & ASSOCIATES, INC.,
Petitioner

v.

KING MANUFACTURING & SALES, INC.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit entered June 27, 1989, affirming the Order of the United States District Court for the Western District of Oklahoma entered June 9, 1988, setting aside and vacating the Settlement Agreement and Dismissal with Prejudice of the United States District Court for the Western District of Oklahoma entered March 10, 1986.

OPINION BELOW

Attached as Appendix A is the Settlement Agreement and Dismissal with Prejudice of the United States District Court of the Western District of Oklahoma, entered March 10, 1986, which is unpublished.

Attached as Appendix B is the Order of the United States District Court for the Western District of Oklahoma, entered June 9, 1988, which is unpublished.

Attached as Appendix C is the Order and Judgment of the United States Court of Appeals for the Tenth Circuit, entered June 27, 1989, which is unpublished.

JURISDICTION

Jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1), seeking review by the Supreme Court by writ of certiorari in a civil case after rendition of judgment.

STATUTORY PROVISIONS INVOLVED

This case involves 28 U.S.C. Sec. 1332 (diversity jurisdiction); 28 U.S.C. Sec. 1471 (bankruptcy jurisdiction); 11 U.S.C. Sec. 362 (automatic stay); 11 U.S.C. Sec. 553 (setoff); 11 U.S.C. Sec. 554 (abandonment); Rule 24, F.R.C.P. (intervention); Rule 60, F.R.C.P. (relief from judgment or order); Bankruptcy Rule 6009 (prosecution of claims by debtor); Bankruptcy Rule 9019 (compromise).

STATEMENT OF THE CASE

On July 12, 1985, Respondent filed Chapter 11 bankruptcy. On October 15, 1985, Respondent sued Petitioner under diversity jurisdiction in federal district court to collect a trade receivable. During discovery, Petitioner learned that Respondent was in bankruptcy. On February 10, 1986 at a scheduling conference before the district court, the Respondent waived the 11 U.S.C. Section 362 automatic stay and the court instructed Petitioner to file its counterclaim within ten days. On February 19, 1986, Petitioner filed its counterclaim in the district court and a proof of claim in bankruptcy court. On February 24, 1986 at settlement conference before the district court, Respondent stipulated that all parties were properly before the court and that the court had jurisdiction of the parties and of the subject matter. On March 7, 1986 the parties settled, agreeing that over the next eighteen months that Respondent would consign goods to Petitioner, who, upon sale of the goods, would waive the first $25,000 in 10% commissions. On March 10, 1986 the district court approved the settlement and signed the order of dismissal. At no time during the district court proceeding was Petitioner aware that Respondent had assigned a security interest in the receivable to Grant Square Bank & Trust Company. Petitioner neither initiated nor received notice of any application to compromise controversy under Bankruptcy Rule 9019. Respondent failed to consign any goods and the agreement expired by its own terms on September 10, 1987. In the meantime, Respondent converted to a Chapter 7 liquidation and the trustee abandoned the receivable to Grant Square Bank & Trust Company. On May 22, 1987, fourteen months after entry of the order approving the settlement and dismissing the

federal district court case, but four months before expiration of the agreement, Grant Square Bank & Trust Company intervened in the district court seeking to set aside the settlement to and vacate the order of dismissal on the ground that the settlement was not approved by the bankruptcy court under Rule 9019. After oral argument, but without admission of evidence, the district court on June 23, 1988 (with a different judge sitting) granted the Bank's motion. On appeal to the Court of Appeals, the Tenth Circuit on June 27, 1989 affirmed the ruling vacating the settlement and order of dismissal, and remanded the matter to the bankruptcy court for further proceedings.

ARGUMENT

QUESTION PRESENTED

IS A SETTLEMENT JUDGMENT RENDERED BY A FEDERAL DISTRICT COURT SUBJECT TO BANKRUPTCY RULE 9019 APPROVAL WHERE THE DEBTOR IN POSSESSION SUES UNDER BANKRUPTCY RULE 6009?

No, it is not.

A Chapter 11 debtor in possession, with or without bankruptcy court approval, may commence and prosecute any action on behalf of the estate before any tribunal. Bankruptcy Rule 6009; 11 U.S.C. Sec. 362; *Morgan Guaranty Trust Co. of N.Y. v. American Savings & Loan Assn.*, 804 F.2d 1487 (9th Cir. 1986), *cert. denied*, 482 U.S. 929, 96 L.Ed.2d 701, 107 S. Ct. 3214 (1987); *Association of St. Croix Condo Owners v. St. Croix Hotel*, 682 F.2d 446, 448 (3rd Cir. 1982); *In re Casco Chemical*

Co., 335 F.2d 645 (5th Cir. 1964); *Matter of Lake Hopatlong Water Corp.*, 15 B.R. 411 (Bk. N.J. 1981).

Where the debtor in possession sues in federal district court, a final judgment of settlement is not subject to Bankruptcy Rule 9019 approval. *Bostick Foundry v. Lindberg*, 797 F.2d 280 (6th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987); *Aro Corporation v. Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976), *cert. denied*, 429 U.S. 862, 50 L.Ed.2d 140, 97 S. Ct. 165 (1976); *Kukla v. National Distiller Products Co.*, 483 F.2d 33, 36 (5th Cir. 1967); *Leon Industries, Inc. v. I.C.N. Pharmaceuticals*, 472 F. Supp. 1241 (E.D. Mo. 1972); *In re Lady Madonna Industries, Inc.*, 76 B.R. 281 (S.D.N.Y. 1987); *In re Neese*, 12 B.R. 968, 970 (W.D. Va. 1981).

QUESTION PRESENTED

IN SUCH A SUIT, MAY THE DEFENDANT ASSERT A COUNTERCLAIM WITHOUT FIRST OBTAINING AN ORDER LIFTING THE 11 U.S.C. SECTION 362 AUTOMATIC STAY?

Yes, he may under certain circumstances.

In any court in which the debtor sues, the defendant may assert its right of setoff or counterclaim. *Clark v. Ferro Corp.*, 237 F. Supp. 230 (E.D. Tenn. 1964).

If the counterclaim is an unexercised prepetition 11 U.S.C. Section 553 setoff, the defendant must obtain a lift of stay prior to exercising the setoff postpetition in a nonbankruptcy forum. 11 U.S.C. Section 553(a); 11 U.S.C. Section 362(a)(1), (b)(7); *In re Saxon Industries, Inc.*, 43 B.R. 64 (Bk. N.Y. 1984); *Waste Management of Tennessee v. Barry Parker's Inc.*, 33 B.R. 115

(Bk. M.D. Tenn. 1983); *contra, In re Bell & Beckwith,* 50 B.R. 422 (Bk. N.D. Ohio 1985).

If the setoff is exercised prepetition, the stay does not apply. *Bridgeport Co. v. U.S. Postal Service,* 39 B.R. 118 (Bk. E.D. Ark. 1984); *In re Compton Corp.,* 22 B.R. 276 (Bk. N.D. Tex. 1982); *In re Princess Baking Corp.,* 5 B.R. 587 (Bk. S.D. Cal. 1980); 4 COLLIER ON BANKRUPTCY, Paragraph 553.05, at 553-29, 30 (15th ed. 1986).

If the setoff arises postpetition, the stay does not apply. *In re Frenville Co., Inc.,* 744 F.2d 332 (3rd Cir. 1984), *cert. denied,* 469 U.S. 1160, 83 L.Ed.2d 925, 105 S. Ct. 911 (1985).

In bankruptcy adversary proceedings brought by the debtor or trustee, the stay does not apply. *In re American Spinning Mills, Inc.,* 43 B.R. 365 (Bk. E.D. Pa. 1984); *In re Vylene Enterprises, Inc.,* 63 B.R. 900, 905 (Bk. C.D. Cal. 1986); *contra, In re Lessig Construction, Inc.,* 67 B.R. 436 (Bk. E.D. Pa. 1986).

In bankruptcy, absent any proceeding whatsoever, a setoff cannot be exercised without a lift of stay. *In re Crabtree,* 76 B.R. 208 (Bk. M.D. Fla. 1987).

If the counterclaim is other than a Section 553 setoff, the stay does not apply. *In re Maine,* 32 B.R. 452 (Bk. W.D. N.Y. 1983) (common law recoupment); 4 COLLIER ON BANKRUPTCY, Paragraph 553.03, at 553-12, 13 (15th ed. 1986).

In instances where the stay is applicable, the debtor or trustee may waive its protection by stipulation or failure to act. *Boynton v. Ball,* 121 U.S. 457, 7 S. Ct. 981, 30 L.Ed. 985 (1887); *In re Herrera,* 23 B.R. 796 (9th Cir. Bk. App. 1982); *In re Sando,* 30 B.R. 474

(Bk. E.D. Pa. 1983); *In re C.C.L. Construction, Inc.*, 32 B.R. 693 (Bk. N.D. Ill. 1983).

A Section 553 setoff is a mutual debt arising prepetition involving different transactions and asserted to reduce or extinguish the claim of one party against another. 11 U.S.C. Sec. 553(a). Mutuality means mutual in time as well as parties, but involves different transactions. *In re Whitman*, 38 B.R. 395 (Bk. D.C. N.D. 1984); *In re O.P.M. Leasing Services, Inc.*, 35 B.R. 854 (Bk. S.D. N.Y. 1983). Recoupment arises from the same transaction and is asserted to abate or reduce a claim, and may involve a judgment for any excess. *In re Maine*, 32 B.R. 452 (Bk. W.D. N.Y. 1983). A counterclaim is broader than either recoupment or setoff. It is asserted not merely to abate or reduce a claim, but to gain affirmative relief. 4 COLLIER ON BANKRUPTCY, Paragraph 553.03, at p. 533-12 (15th ed., 1986). Section 553 "represents a decision by Congress to restrict the right of setoff and to treat its exercise as a preference under certain limited circumstances." *Id.* at 553-6.

In this case, the parties stipulated that Respondent owed Petitioner $73,924.89 in back commissions. To recover a part of that sum, and before commencement of the case in bankruptcy, Petitioner sold $60,463.18 worth of consigned stock in its possession and kept the proceeds. The question raised by Respondent in the Final Pretrial Order was not if or when this was done, but whether Petitioner had the authority to do so. In June 1985, the month before Respondent filed Chapter 11, Petitioner returned to Respondent all consigned stock remaining on hand.

Respondent's complaint, filed postpetition in the district court, alleges that Petitioner owed $40,507.43 on open

account, the delinquency arising from a combination of invoice debits, commission credits, consigned stock shortages, and other adjustments. Petitioner's response was that its books of account did not agree, and took the initial position that it owed Respondent nothing. After discovery and extensive comparison of accounts, Petitioner concluded that not only did it owe Respondent nothing, but also the records confirmed that Respondent owed Petitioner $11,123.35 on open account for commissions earned but not paid, freight charge reimbursements due, incorrectly debited invoices, and other adjustments. It was then that Petitioner prepared its counterclaim to recover the excess. The counterclaim was filed under court instruction and after Respondent waived the Section 362 stay. The primary questions on the counterclaim were whether Petitioner was due commissions on the sale of consigned stock, and whether it was due credits for incorrectly billed invoices and freight charges.

Petitioner asserts that its position was nothing more than common law recoupment arising prepetition out of the same transaction, i.e., the open account between the parties, and was not subject to the automatic stay. Even if it was not a recoupment but a Section 553 setoff, over $60,000 was exercised prepetition and was not subject to the stay; or if any portion was postpetition,[1] Respondent waived its Section 362 protection. The settlement judgment, therefore, was validly entered by the district court within its jurisdiction and is not subject to attack.

---

1. Since Petitioner was unaware of its counterclaim until Debtor's postpetition suit, the counterclaim arguably arose postpetition and was not subject to the stay. *In re Bell & Beckwith*, 50 B.R. 422 (Bk N.D. Ohio 1985).

QUESTION PRESENTED

IS *BOSTICK* DISTINGUISHABLE ON THE FACTS?

No, it is not.

In its Order and Judgment of June 27, 1989 the Tenth Circuit Court of Appeals declined to apply *Bostick Foundry Co. v. Lindberg, supra,* distinguishing it on the facts. The Court of Appeals held in this case that unlike *Bostick*:

(1) The Respondent filed postpetition;

(2) The automatic stay remained in effect;

(3) The settlement agreement was not performed; and

(4) The Bank was a secured creditor while Petitioner was a general unsecured creditor.

The fact that Respondent filed this case postpetition is a distinction without a difference. While there is some authority that the automatic stay does not apply to continued prosecution by the debtor, i.e., actions pending when the bankruptcy commenced, 8 COLLIER ON BANKRUPTCY, Paragraph 6009.03 at p. 6009-2 (15th ed., 1986), the debtor clearly may invoke the jurisdiction of any nonbankruptcy forum at any time, with or without court approval. Bankruptcy Rule 6009.

The automatic stay was not in effect. As argued above, the stay was inapplicable to any setoff exercised prepetition; inapplicable to any setoff arising postpetition; inapplicable to recoupment or any counterclaim not a setoff in nature; and, in any event, the stay was waived by the Respondent.

The settlement agreement was not performed *by the Respondent.* As a condition to performance by Petitioner,

Respondent had to ship consigned stock. By the terms of the agreement, if Respondent failed to do so, Petitioner was discharged. Settlement Agreement, Paragraph 3(e).

A defendant asserting a Section 553 setoff is a secured creditor to the extent of its setoff, and unsecured for the excess. 11 U.S.C. Sec. 506(a); *In re Lessig Construction, Inc.*, 67 B.R. 436 (Bk. E.D. Pa. 1986); *In re Princess Baking Corp.*, 5 B.R. 587 (Bk. S.C. Cal. 1980).

There is, therefore, no material factual difference between this case and *Bostick Foundry Co. v. Lindberg, supra.*

QUESTION PRESENTED

CAN A CREDITOR HOLDING A SECURED CLAIM, NOT A PARTY TO THE SETTLEMENT JUDGMENT, BUT WITH CONSTRUCTIVE KNOWLEDGE OF IT AND IN PRIVITY WITH THE DEBTOR, INTERVENE IN THE DISTRICT COURT FOURTEEN MONTHS AFTER JUDGMENT, AND AFTER THE CLAIM HAS BEEN ABANDONED TO THE CREDITOR BY THE TRUSTEE AND IS NO LONGER PROPERTY OF THE ESTATE, TO SET ASIDE THE JUDGMENT ON THE GROUND IT LACKED RULE 9019 APPROVAL?

No, it can not.

The Court of Appeals in its Order and Judgment of June 27, 1989 held Petitioner to constructive knowledge of the Bank's security interest in the receivable but excused the Bank's failure to act sooner because "it had no (actual) knowledge of the settlement agreement". The Court of Appeals failed to explain why different standards should apply, or why the Bank did not have constructive knowledge of Petitioner's claim in bank-

ruptcy. All parties—the Bank, Petitioner and Respondent —were eventual parties to the bankruptcy action. Petitioner filed its claim in bankruptcy on the same day it filed its counterclaim in district court, and the proof of claim specifically referred to the district court litigation by case number and jurisdiction.

Further, as a secured creditor of Respondent on the very receivable litigated and reduced to settlement judgment in district court, the Bank was bound by the judgment. The Bank was in privity with Respondent. Their interests against Petitioner were not adverse to one another, but instead were so closely aligned that the Bank's recovery was dependent in whole or in part on the outcome of the lawsuit. *Vulcan, Inc. v. Fordees Corp.*, 658 F.2d 1106 (6th Cir. 1981).

The Bank moved to "intervene" under Rule 60(b)(6), and to set aside the judgment for "any other reason justifying relief". The Bank had no standing to seek relief under Rule 60(b), for any reason, since it was not a party to the judgment. *United States v. International Tel. & Tel. Corp.*, 349 F. Supp. 22 (D.C. Conn. 1972), *aff'd*, 420 U.S. 919, 35 L.Ed.2d 582, 93 S. Ct 1363; *Kem Mfg. Corp. v. Wilder*, 817 F.2d 1517 (11th Cir. 1987); *Screven v. United States*, 207 F.2d 740 (5th Cir. 1953); *United States v. West Willow Apartments, Inc.*, 245 F. Supp. 755 (D.C. Mich. 1965); *Karnegis v. Schooler*, 57 F. Supp. 178 (D.C. Tex. 1944). Neither can the Bank intervene as a non-party under Rule 24 (a)(2), F.R.C.P., since this rule contemplates intervention prior to judgment.

Even if the Bank could have intervened under Rule 60(b), it is now barred by the one year time limit, which

is the outer time limit and mandatory under Subsections (1), (2), (3) and (5). *Vamont Industries, Inc. v. Yuma Mfg. Co.*, 50 F.R.D. 408 (D.C. Colo. 1970), *aff'd*, 446 F.2d 1193, *cert. denied*, 405 U.S. 922, 30 L.Ed.2d 793 (1972), 92. S Ct. 960; *Cavalier Label Co., Inc. v. S.S. Lilika*, 71 F.R.D. 39 (D.C. N.Y. 1976); *Federal Deposit Insurance Corp. v. Alker*, 30 F.R.D. 527 (D.C. Pa. 1962), *aff'd*, 316 F.2d 236, *cert. denied*, 375 U.S. 880, 11 L.Ed.2d 111, 84 S. Ct. 150 (1963).

The one year limit pertains to the grounds set forth in Rule 60(b)(1) to (3) and (5):

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial;

(3) fraud, misrepresentation, or other misconduct of an adverse party;

(5) the judgment has been satisfied, released or discharged, or it is no longer equitable that the judgment should have prospective application.

Void judgments may be attacked at any time, Rule 60(b)(6), (4).

The one year rule is not applicable under Rule 60 (b)(6), the ground invoked by the Bank. *United States v. Cirami*, 563 F.2d 26 (N.Y. 1977). However, the Bank cannot circumvent the one year rule by invoking Rule 60(b)(6) where the facts also meet the test of Rule 60(b)(1)-(5). *Serzyko v. Chase Manhattan Bank*, 461 F.2d 699 (N.Y. 1972), *cert. denied*, 409 U.S. 883, 34

L.Ed.2d 139, 93 S. Ct. 173 (1972). To prevail under Rule 60(b)(6), the movant must still file within a reasonable time, depending upon the facts and circumstances, and must show extraordinary circumstances or extreme hardship. *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation,* 459 F. Supp. 1242 (D.C. N.Y. 1978), *aff'd,* 605 F.2d 648. In this instance, the Bank has offered no explanation for its delay. On the other hand, the hardship caused Petitioner by setting aside the judgment is manifest: (1) Petitioner made the agreement in good faith without notice of the Bank's security interest; (2) Petitioner was the defendant, did not initiate the litigation, and justifiably relied upon Respondent's right to bring an action in district court; (3) Respondent waived the Sec. 362 stay in open court and in its Pretrial Order; (4) Petitioner entered an appearance in the bankruptcy action by filing a proof of claim; (5) Petitioner incurred substantial attorney's fees to reach settlement; (6) Petitioner performed under the settlement agreement to the full extent required, which agreement had expired under its own terms prior to the order setting aside the settlement; and (7) Petitioner has incurred additional and substantial costs to defend the judgment.

The Bank was simply negligent in not diligently pursuing its security interest and its situation falls squarely within Rule 60(b)(1), if at all. Undisputed facts show that the Bank knew Petitioner was on the receivables list, and knew or should have known that Petitioner had filed a proof of claim in the same bankruptcy proceeding to which the Bank was a party, that the Bank never gave Petitioner notice of its security interest or of the trustee's abandonment, and knew or should have known of Re-

spondent's efforts to collect its receivables in the district court.

If a party through its silence or inaction, with knowledge of the facts, or with knowledge of the facts available to it and not used, allows a judgment to fall and offers no convincing explanation for its delay in raising objections, its motion for relief under Rule 60(b) is not timely. *Mungin v. Florida East Coast Railway Co.*, 318 F. Supp. 720 (D.C. Fla. 1970), *aff'd*, 441 F.2d 728, *cert. denied*, 404 U.S. 897, 30 L.Ed.2d 175, 92 S. Ct. 203 (1971).

QUESTION PRESENTED

IN THIS SITUATION, DOES THE BANKRUPTCY COURT HAVE JURISDICTION ON REMAND?

No, it does not.

During the litigation, Respondent converted to a Chapter 7. The receivable was abandoned by the trustee to the Bank. On abandonment the property moves outside the estate, and is no longer within bankruptcy court jurisdiction. 11 U.S.C. Sec. 554; *In re Bryson*, 13 B.C.D. (Bk. M.D. Tenn. 1985); 4 COLLIER ON BANKRUPTCY, Paragraph 554.02 at p. 554-6 (15th ed. 1986).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal questions were raised by the Bank's motion to intervene in the district court, and Petitioner's responses to that intervention. The trial court and the court of appeals below ruled against Petitioner, holding that *Bostick Foundry Co. v. Lindberg, supra,* was distinguishable on the facts and not controlling.

REASONS FOR GRANTING THE WRIT

Bostick Foundry Co. v. Lindberg, supra, is good law, and absent any material fact differences, dictates the disposition of this case in favor of Petitioner. Because of the confusion among the courts on the ability of a defendant to counterclaim a debtor in district court, and the jurisdiction of the district court in such an instance as opposed to that of the bankruptcy court, and whether Bankruptcy Rule 9019 applies to district court judgments, the Supreme Court should grant a writ to clarify these important questions of practice affecting all district and bankruptcy courts in the United States.[2] Further, the writ should be granted because:

(1) This case is "on all fours" with *Bostick,* which is controlling;

(2) The order of the Tenth Circuit Court of Appeals is contrary to *Bostick,* creating a conflict between courts of appeal;

(3) The issues presented herein affect the jurisdiction of all district and bankruptcy courts and should be settled by the Supreme Court; and

(4) The decision of the Tenth Circuit Court of Appeals in this case conflicts with *Bostick,* already reviewed and approved by the Supreme Court.

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2. Also presented is the question whether a valid district court judgment may be attacked by a non-party bound by privity but unaware of the judgment through its own negligence.

CONCLUSION

Petitioner prays that this Petition for Writ of Certiorari be granted.

Respectfully submitted this _____ day of September, 1989.

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September 1989

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-85-2614
BT ARB

KING MANUFACTURING AND SALES, INC.,
Plaintiff,

v.

BOB HERBERT & ASSOCIATES, INC.,
Defendant.

(Filed March 10, 1986)

DISMISSAL WITH PREJUDICE

COMES NOW the parties hereto and dismiss the above-styled and numbered cause of action, Plaintiff dismissing its Complaint against Defendant, and Defendant dismissing its Counterclaim against Plaintiff, both with prejudice as to the filing of any future action in this matter.

KING MAUFACTURING
AND SALES, INC.
An Oklahoma Corporation

By: _____
President

Geary L. Walke #9279
3904 East Reno
Oklahoma City, OK 73117
(405) 677-2407
Attorney for Plaintiff

BOB HERBERT &
ASSOCIATES, INC.
A Texas Corporation

By: /s/ Signature Illegible
President

/s/ GERALD HOPKINS
Gerald Hopkins
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

CASE NO. CIV-85-2614

BT ARB

KING MANUFACTURING AND SALES, INC.,
Plaintiff,

v.

BOB HERBERT & ASSOCIATES, INC.,
Defendant.

(Filed March 10, 1986)

SETTLEMENT AGREEMENT

This agreement, made and entered into this 10th day of March, 1986, by and between KING MANUFACTURING AND SALES, INC., an Oklahoma Corporation, hereinafter referred to as "Plaintiff", and BOB HERBERT & ASSOCIATES, INC., a Texas Corporation, hereinafter referred to as "Defendant".

WITNESSETH:

WHEREAS, on October 25, 1985, Plaintiff caused to be filed in the United States District Court for the Western District Of Oklahoma, Case No. CIV-85-2614-BT (the "lawsuit"); and,

WHEREAS, Plaintiff and Defendant have agreed that it is in the best interest of the parties to settle and compromise the lawsuit; and,

WHEREAS, Plaintiff and Defendant have agreed upon certain sums, as hereinafter set forth, upon which this Settlement Agreement is based; and,

WHEREAS, this Settlement Agreement is intended to minimize the costs and expenses, both direct and indirect, of further litigation between the parties herein, as well as to benefit both parties in the contemplation of their respective businesses;

NOW, therefore, it is mutually stipulated and agreed by and between Plaintiff and Defendant, as follows:

1. The undersigned and their attorneys each agree to use their best efforts to effectuate this Settlement Agreement.

2. Plaintiff and Defendant agree that any and all commissions heretofore claimed by Defendant to be due and owing from the Plaintiff, are hereby determined to be considered null and void, with no effect, forgiven, and cancelled, and that all such claims for commissions due by Defendant, prior to the date of this agreement, are therefore, considered by the parties as paid in full.

3. For purposes of this Settlement Agreement only, and not as an admission of liability on the part of the Defendant, but for purposes of settlement of all claims now existing between Plaintiff and Defendant, the parties agree that the net sum of Twenty-Five Thousand Dollars ($25,000.00) shall inure to the benefit of the Plaintiff, in the following manner;

(a) The term of this Settlement Agreement shall be eighteen (18) months from the date upon which this agreement is executed. All matters hereinafter set forth shall be initiated by the parties during

the term of this agreement, and shall be extended only upon one (1) of the following two (2) occurrences:

(i) Upon written agreement of the parties; or,

(ii) For a reasonable period of time in order to conclude any transactions contemplated by or between the parties which were initiated within the eighteen (18) month period.

(b) Within the term of this agreement, Plaintiff shall provide to the Defendant manufactured goods with a total invoice price of Two Hundred Fifty Thousand Dollars ($250,000.00). Said manufactured goods may be shipped from Plaintiff to the Defendant as consigned stock, in which case the Defendant shall provide free warehousing and Defendant will assume all responsibility therefore as and for a bailment of said consigned stock.

(c) Other than consigned stock, as set forth above, Defendant may place orders with the Plaintiff, which the Plaintiff shall fill, either from Plaintiff's existing inventory or shall manufacture within a reasonable period of time, and provide to the Defendant, pursuant to said orders.

(d) During the term of this agreement, or any extensions thereof, Defendant shall sell Two Hundred Fifty Thousand Dollars ($250,000.00) worth of Plaintiff's products as determined by the invoice prices, and KING shall invoice, collect, and keep one hundred percent (100%) of all proceeds from said sales. Defendant shall not be entitled to any commission thereon, nor shall Defendant

be entitled to any discounts, other than as shown on the respective invoices or by written agreement between the parties.

(e) In the event Plaintiff is unable to provide Two Hundred Fifty Thousand Dollars ($250,000.00) worth of products to the Defendant within the term of this agreement, or any extensions thereof, then, in that event, Defendant shall not be obligated to Plaintiff beyond the end of the term of this agreement, or any extension thereof.

(f) Plaintiff and Defendant shall monitor the consigned stock, and other sales by Defendant of Plaintiff's products, on a monthly basis, and each of the parties shall use good faith in all efforts to reconcile any documentary differences which may occur.

(g) Defendant will not sell to any buyer unless Plaintiff has approved said buyer for credit-worthiness.

4. This agreement is made in full settlement of all claims each party may have against the other.

5. Plaintiff and Defendant, upon execution of this agreement, shall each execute a Dismissal Without Prejudice as to the above styled and numbered action in the United States District Court for the Western District of Oklahoma. It is fully understood that Plaintiff's claim against the Defendant in said action was the sum of Sixty-six Thousand Three Hundred Sixty-eight Dollars and Nineteen Cents ($66,368.19) plus costs and interest, and in compromise of said lawsuit, Plaintiff is accepting the net sum of Twenty-five Thousand Dollars ($25,000.00) as represented from the regular ten percent

(10%) commission which will be paid to the Plaintiff rather than to the Defendant upon the sales contemplated by this agreement.

6. Their agreement is signed with the approval of the attorneys and is binding upon the heirs, assigns, and successors of the parties hereto.

KING MAUFACTURING
AND SALES, INC.
An Oklahoma Corporation

By: _____
President

ATTEST:

_____
Secretary

(SEAL)

_____

Geary L. Walke #9279
3904 East Reno
Oklahoma City, OK 73117
(405) 677-2407
Attorney for Plaintiff

BOB HERBERT &
ASSOCIATES, INC.
A Texas Corporation

By: /s/ Signature Illegible
President

ATTEST:

/s/ Signature Illegible
Secretary

(SEAL)

/s/ GERALD HOPKINS
Gerald Hopkins
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Houston, Texas 77056
Attorney for Defendant

Wayne Barnes #532
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Attorney for Defendant

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. CIV-85-2614-P

KING MANUFACTURING & SALES, INC.,
Plaintiff,

v.

BOB HERBERT & ASSOCIATES, INC.,
Defendant.

ORDER

NOW ON THIS 9th day of June, 1988, this matter comes on for further hearing having been continued from June 1, 1988. Movant, Grant Square Bank & Trust Company, appears by counsel, Thomas S. Bala; Defendant, Bob Herbert & Associates, Inc., appears by counsel, Gerald E. Hopkins, local counsel, Terry T. Wiens, having been excused. Thereupon the Court found that Grant Square Bank & Trust Company should be permitted to intervene and be substituted as Plaintiff. The Court further found that the Dismissal With Prejudice And Settlement Agreement heretofore entered, should be vacated. The Court further found that its findings shall be incorporated herein by the record made and made a part of this Order. In addition, the Court remands this matter to the United States Bankruptcy Court For The Western District Of Oklahoma for a review of the Settlement Agreement between the original parties and any other related bankruptcy matters.

IT IS SO ORDERED THIS 9TH DAY OF JUNE, 1988.

LAYN PHILLIPS
District Judge

APPROVED AS TO FORM:

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501 Northwest Expressway
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Oklahoma City, Oklahoma 73118
Telephone: (405) 842-7330

Attorney for Grant Square
Bank & Trust Company

/s/ GERALD E. HOPKINS 06/14/88

Gerald E. Hopkins
715 West 16th Street
Houston, Texas 77008
Telephone: (713) 492-6301

Attorney for Defendant

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 88-2148
(D. C. No. CIV-85-2614-P)
(W.D. Okla.)

KING MANUFACTURING & SALES, INC.,
Plaintiff-Appellee,

v.

BOB HERBERT & ASSOCIATES, INC.,
Defendant-Appellant.

(Filed June 27, 1989)

ORDER AND JUDGMENT*

Before MOORE, ANDERSON, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(1); 10th Cir. R. 34.1.9.

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

The cause is therefore ordered submitted without oral argument.

Bob Herbert & Associates, Inc. (Herbert), appeals from an order of the district court vacating the dismissal of the case with prejudice, and permitting Grant Square Bank & Trust Co. (Bank) to intervene and be substituted as Plaintiff.

The facts in this case are undisputed. King Manufacturing & Sales, Inc. (King) granted to Bank a secured interest in certain accounts receivable, including one in the amount of $40,000 owing from Appellant Herbert. King then filed a petition for Chapter 11 bankruptcy. Subsequently, and with counsel different from his bankruptcy counsel, King sued Herbert in the United States District Court to collect the account receivable. The record in that case bears no indication that King was in bankruptcy. In the action on the account, King and Herbert entered into a settlement agreement which essentially provided the parties would continue to do business with one another until a certain amount of gross had been achieved. Herbert would take no commission, and thus King would be made whole. The parties also agreed that $25,000 rather than $40,000 was the amount due. At no time did Bank receive notice of the settlement agreement. Further, the bankruptcy court did not approve the settlement.

After King and Herbert achieved their settlement, and as a part of the agreement, the parties entered a dismissal of the action with prejudice. Subsequently, the bankruptcy court converted the Chapter 11 proceeding into a Chapter 7 proceeding, and the parties did not comply with the terms of the settlement agreement.

Furthermore, the bankruptcy court appointed a trustee who abandoned the account receivable to Bank, the secured creditor.

Some fourteen months after the settlement agreement and dismissal with prejudice were filed, Bank filed a motion to intervene or in the alternative for substitution of parties, and also a motion to vacate the settlement agreement and dismissal. The court held a hearing on the motions, and found that Bank should be permitted to intervene and be substituted as Plaintiff. Further, the court ordered vacation of the settlement agreement, and remanded the matter to the United States bankruptcy court for a review of the settlement agreement between the original parties.

Appellant Herbert asserts three contentions: (1) where the debtor pursues a claim outside the bankruptcy jurisdiction and invokes the jurisdiction of the federal district court, a settlement is not subject to bankruptcy court approval; (2) Bank had no standing to seek relief since it was not a party to the judgment; and (3) Bank is time-barred by the one-year time limit under Fed. R. Civ. P. 60(b) and, if not, it did not file within a reasonable time. We are not persuaded by Herbert's contentions and AFFIRM the decision of the trial court.

In support of his first contention, Herbert cites *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280 (6th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987). The district court distinguished *Bostick* from the case now before us, and we agree with his analysis. In *Bostick*, a Chapter 11 debtor sued his seller for alleged negligence and breach of warranty incident to the sale by the defendant of an industrial furnace. Almost two years later, the debtor filed a petition for bankruptcy under Chapter 11. The

bankruptcy court confirmed the sale of certain of debtor's assets, but excluded therefrom debtor's district court lawsuit against his supplier. Prior to trial, the parties reached a settlement which included a dismissal with prejudice of all of the claims of the parties. After settlement between the parties, Bostick's creditors filed an application in the bankruptcy court seeking to set aside the settlement, charging that it was not in the best interests of the estate. The bankruptcy judge issued an order wherein he rejected the district court's settlement. In ruling on a motion for leave to appeal this order, the district judge concluded the bankruptcy court order was not a final appealable order and dismissed the appeal.

Subsequently, the defendant-supplier filed a motion in district court to enforce the settlement and dismiss the complaint with prejudice. The district judge granted the motion, concluding the district court possessed continuing jurisdiction over the case, the proceedings had not been removed to the bankruptcy court, the bankruptcy court had lifted the stay of the district court proceeding that had automatically attached to the action by operation of law, the settlement was concluded by Bostick's counsel of record, and the bankruptcy rules did not affect the jurisdiction of the district court or its authority to dismiss the plaintiff's complaint pursuant to a settlement concluded by the parties.

On appeal, the debtor Bostick claimed the district court's dismissal was erroneous because counsel had repudiated the settlement and the district court's enforcement of the settlement was improper in light of the intervening bankruptcy actions. The Sixth Circuit, sitting *en banc*, held the district court had authority to enforce settlement of suit, though subsequent to filing suit seller

instituted voluntary bankruptcy proceedings. The court reasoned that the bankruptcy rules govern the procedure to be followed in the bankruptcy court and do not negate the diversity jurisdiction of a district court properly entertaining a related case. The Sixth Circuit affirmed the district court's decision granting the defendant supplier's motion to enforce the settlement and to dismiss the plaintiff's complaint with prejudice.

In the instant case, unlike the facts of *Bostick*, King filed suit against Herbert subsequent to his (King's) filing for bankruptcy. Further, Herbert filed a counterclaim even though the automatic stay was in effect, and the automatic stay remained in effect at the time of the settlement agreement and dismissal with prejudice. Although in *Bostick* the settlement agreement was fully complied with, in the instant case the parties have not performed under the settlement agreement. Most critically, in the instant case, the creditor, Bank, was a secured creditor with a security interest in the subject matter of the litigation, whereas in *Bostick* the complaining creditors apparently were general, unsecured creditors.

In our view, the settlement in this case was subject to bankruptcy court approval. Although Bankruptcy Rule 6009 provides the debtor may, with or without court approval, *commence and prosecute* any action on behalf of the estate before any tribunal, Bankruptcy Rule 9019 allows *compromise* upon motion by the trustee and after a hearing on notice to creditors. This is not a case of procedural versus jurisdictional interests. Bank was the holder of a perfected security interest in the account receivable. Herbert had constructive notice if not actual notice of this fact. Herbert was not entitled to ignore this fact and enter into a settlement which denigrated

Bank's rights in the account receivable without allowing Bank the right to be heard. Due to the chronology of events and nature of the interests, notice should have been given to the creditors and they should have been given the opportunity to be heard.

Herbert next contends that under Fed. R. Civ. P. 60(b), Bank had no standing to seek relief since it was not a party to the judgment. He further asserts that Bank could not properly intervene under Fed. R. Civ. P. 24(a)(2) because that rule contemplates intervention prior to judgment. In our view, Herbert misses the real issue; that the nature of Bank's interest renders void any judgment entered in an action to which Bank was not a party. We find no merit to Herbert's assertions of error on this issue.

Herbert next asserts Bank's motion to vacate the dismissal with prejudice and set aside the settlement agreement was not timely. We are not persuaded by his argument. Fed. R. Civ. P. 60(b) gives the court authority to relieve a party, or his legal representatives from a final judgment for various reasons including the most comprehensive "any other reason justifying relief from the operation of the judgment." The motion must be made "within a reasonable time." Although Herbert argues the application of the one-year time limit referred to in the rule, the provision applies only to subsections (1), (2), and (3) of the rule, and not to the subsection in question. Consequently, Herbert's assertion of error is without merit.

Finally, Herbert argues that Bank did not seek relief in a timely fashion, did not offer explanation for the delay in filing its motions for relief, and contends that

Bank was negligent in diligently pursuing its secured interest. Herbert states Bank knew he (Herbert) was on the receivables list of the bankruptcy petition and should have known that Herbert had filed a proof of claim. Ample evidence in the file supports the fact that Bank did not move for relief from the settlement agreement because it had no knowledge of the settlement agreement. In view of this fact, Bank's request for relief was not untimely.

The decision of the United States District Court for the Western District of Oklahoma is in all respects AFFIRMED.

Entered for the Court:

WADE BRORBY
United States Circuit Judge

No. 89-573

In The

Supreme Court of the United States

October Term, 1989

BOB HERBERT & ASSOCIATES, INC.,

Petitioner,

vs.

KING MANUFACTURING & SALES, INC.

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF INTERVENOR GRANT SQUARE BANK & TRUST COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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November 21, 1989

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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QUESTIONS PRESENTED

1. IS A SETTLEMENT JUDGMENT RENDERED BY A FEDERAL DISTRICT COURT SUBJECT TO BANKRUPTCY RULE 9019 APPROVAL WHERE THE DEBTOR IN POSSESSION SUES UNDER BANKRUPTCY RULE 6009?

2. IN SUCH A SUIT, MAY THE DEFENDANT ASSERT A COUNTERCLAIM WITHOUT FIRST OBTAINING AN ORDER LIFTING THE 11 U.S.C. SECTION 362 AUTOMATIC STAY?

3. IS *BOSTICK* DISTINGUISHABLE ON THE FACTS?

4. CAN A CREDITOR HOLDING A SECURED CLAIM, NOT A PARTY TO THE SETTLEMENT JUDGMENT, BUT WITH A CONSTRUCTIVE KNOWLEDGE OF IT AND IN PRIVITY WITH THE DEBTOR, INTERVENE IN THE DISTRICT COURT FOURTEEN MONTHS AFTER JUDGMENT, AND AFTER THE CLAIM HAS BEEN ABANDONED TO THE CREDITOR BY THE TRUSTEE AND IS NO LONGER PROPERTY OF THE ESTATE, TO SET ASIDE THE JUDGMENT ON THE GROUND IT LACKED RULE 9019 APPROVAL?

5. IN THIS SITUATION, DOES THE BANKRUPTCY COURT HAVE JURISDICTION ON REMAND?

LIST OF INTERESTED PARTIES

1. BOB HERBERT & ASSOCIATES, INC., Houston, Texas, Petitioner.

2. GERALD E. HOPKINS, 4920 Center, Houston, Texas, Attorney for Petitioner.

3. TERRY T. WIENS, 3015 N.W. 59th Street, Oklahoma City, Oklahoma, Attorney for Petitioner.

4. KING MANUFACTURING & SALES, INC., Oklahoma City, Oklahoma, Respondent.

5. GEARY L. WALKE, 3904 East Reno, Oklahoma City, Oklahoma, Attorney for Respondent in the U.S. District Court, Western District of Oklahoma.

6. GRANT SQUARE BANK & TRUST COMPANY, Oklahoma City, Oklahoma, Intervenor.

7. THOMAS S. BALA, 501 N.W. Expressway, Suite 220, Oklahoma City, Oklahoma, Attorney for Intervenor. The caption does not reveal the name of the Intervenor.

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No. 89-573

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BRIEF OF INTERVENOR GRANT SQUARE BANK & TRUST COMPANY IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The Intervenor, Grant Square Bank & Trust Company, real party in interest, respectfully submits that the Petition for Writ of Certiorari should be denied.

STATUTES INVOLVED

The pertinent statutes involved in this case are 28 U.S.C. §1334 (bankruptcy jurisdiction); 11 U.S.C. §362 (automatic stay); Rule 24, F.R.C.P. (intervention); Rule 60,

F.R.C.P. (relief from judgment or order); Bankruptcy Rule 6009 (prosecution of claims by debtor); Bankruptcy Rule 9019 (compromise).

STATEMENT OF THE CASE

Intervenor herein adopts as their Statement of the Case the facts set out by the Tenth Circuit Court of Appeals in its unpublished decision of June 27, 1989 (No. 88-2148), set forth herein.

"The facts in this case are undisputed. King Manufacturing & Sales, Inc. (King) granted to Bank a secured interest in certain accounts receivable, including one in the amount of $40,000.00 owing from Appellant Herbert. King then filed a Petition for Chapter 11 bankruptcy. Subsequently, and with counsel different from his bankruptcy counsel, King sued Herbert in the United States District Court to collect the account receivable. The record in that case bears no indication that King was in bankruptcy. In the action on the account, King and Herbert entered into a settlement agreement which essentially provided the parties would continue to do business with one another until a certain amount of gross had been achieved. Herbert would take no commission, and thus King would be made whole. The parties also agreed that $25,000.00 rather than $40,000.00 was the amount due. At no time did Bank receive notice of the settlement agreement. Further, the Bankruptcy Court did not approve the settlement.

After King and Herbert achieved their settlement, and as a part of the agreement, the parties entered a

dismissal of the action with prejudice. Subsequently, the Bankruptcy Court converted the Chapter 11 proceeding into a Chapter 7 proceeding, and the parties did not comply with the terms of the settlement agreement. Furthermore, the Bankruptcy Court appointed a Trustee who abandoned the account receivable to Bank, the secured creditor.

Some fourteen months after the settlement agreement and dismissal with prejudice were filed, Bank filed a motion to intervene or in the alternative for substitution of parties, and also a motion to vacate the settlement agreement and dismissal. The Court held a hearing on the motions, and found that Bank should be permitted to intervene and be substituted as Plaintiff. Further, the Court ordered vacation of the settlement agreement, and remanded the matter to the United States Bankruptcy Court for a review of the settlement agreement between the original parties."

SUMMARY OF REASONS FOR DENYING THE WRIT

There is no conflict among the Circuits on the Questions Presented. The Tenth Circuit correctly distinguished *Bostick Foundry Co. v. Lindberg*, 797 F.2d 280 (6th Cir. 1986), *cert. denied* 479 U.S. 1066 (1987).

Further, Petitioner's reliance on 28 U.S.C. §1471 as distinguishing the jurisdiction between district courts and bankruptcy courts is totally misplaced, §1471 having been declared unconstitutional by this Court.

REASONS FOR DENYING THE WRIT

1. There is no conflict among the Circuits by the Tenth Circuit's opinion correctly analyzing this case.

Petitioner argues that *Bostick Foundry Co. v. Lindberg, supra,* is controlling because the instant case is "on all fours" with *Bostick.*

Intervenor would respectfully submit the facts in this case and the facts in *Bostick* are quite clearly distinguishable, the main difference being one of Constitutional magnitude, the Fifth Amendment right to due process before one can be deprived of property. The critical difference between the cases is: in the instance case, the creditor, Intervenor, was a secured creditor with a properly perfect security interest in the subject matter of the litigation, whereas in *Bostick,* the complaining creditors apparently were general, unsecured creditors.

In *Fuentes v. Shevin,* 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972) this Court states the essence of the meaning of procedural due process:

> "For more than a century the central meaning of procedural due process has been clear: 'parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must be notified.' *Baldwin v. Hale,* 68 U.S. 223. See *Windsor v. McVeigh,* 93 U.S. 274; *Hovey v. Elliott,* 167 U.S. 409; *Grannis v. Ordean,* 234 U.S. 385. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo,* 380 U.S. 545, 552."

In the instant case, the district court vacated the settlement agreement and dismissal with prejudice because Intervenor had neither notice nor opportunity to be heard in a proceeding which deprived Intervenor of a vested property interest. Bankruptcy Rule 9019 allows compromise and settlement of a claim but only after a hearing on notice to creditors. Bankruptcy Rule 9019 merely codifies in a bankruptcy context the Constitutional mandate of notice and hearing before a vested property interest can be affected.

Thus, there is no conflict between the instant case and *Bostick* because in *Bostick* the general creditors had no property interest while in the instant case Intervenor was possessed of a properly perfected security interest in the very subject matter of the litigation.

2. Petitioner relies on a statute declared unconstitutional by this Court.

Petitioner contends that this Court should grant a Writ to clarify "the confusion among the courts on the ability of a defendant to counterclaim a debtor in district court, and the jurisdiction of the district court in such an instance as opposed to that of the bankruptcy court, and whether Bankruptcy Rule 9019 applies to district court judgments . . . " Petitioner cites 28 U.S.C. §1471 (bankruptcy jurisdiction) as a stautory provision involved in its Petition For Writ Of Certiorari. However, in *Northern Pipeline Construction Company v. Marathon Pipeline Company*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) this Court held that the broad jurisdiction granted to bankruptcy judges and 28 U.S.C. §1471, violated Article

III of the Constitution and was invalid. Subsequently, Congress enacted remedial legislation, repealing 28 U.S.C. §1471 and enacting 28 U.S.C. §1334 which for the most part vests original and exclusive jurisdiction of all cases under Title 11 in the district courts. Thus, Petitioner's apparent confusion regarding the jurisdiction of the district court as opposed to that of the bankruptcy court has already been resolved by the repeal of 28 U.S.C. §1471 and the enactment of 28 U.S.C. §1334.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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November 21, 1989